Before the

Federal Communications Commission

Washington, DC 20554

In the Matter of	)	**WT Docket No. 13-238**
Acceleration of Broadband Deployment by	)	
Improving Wireless Facilities Siting Policies	)	
	)	
Acceleration of Broadband Deployment:	)	**WC Docket No. 11-59**
Expanding the Reach and Reducing the Cost of	)	
Broadband Deployment by Improving Policies	)	
Regarding Public Rights of Way and Wireless	)	
Facilities Siting	)	
	)	
Amendment of Part I and 17 of the	)	**RM-11688 (terminated)**
Commission's Rules Regarding Public	)	
Notice Procedures for Processing Antenna	)	
Structure Registration Application for	)	
Certain Temporary Towers	)	
	)	
2012 Biennial Review of	)	**WT Docket No. 13-32**
Telecommunications Regulations	)	

Comments of The Piedmont Environmental Council

To the Notice of Proposed Rulemaking

INTRODUCTION

The Piedmont Environmental Council ("PEC") is a Virginia Non-Stock Corporation recognized by the Internal Revenue Service as a 501 (c)(3) charitable organization. PEC is nationally accredited by the Land Trust Accreditation Committee. It is headquartered in Warrenton, Virginia and serves nine counties in the Northern Piedmont of Virginia. PEC was founded in 1972 to work with the citizens of our nine-county region to conserve land, create high-quality communities, strengthen rural economies, celebrate historic resources, protect air and water quality, build smart transportation networks, promote sustainable energy choices, restore wildlife habitat, and improve people's access to nature.

PEC is interested in the FCC Rules because decisions regarding infrastructure at the national level have impacts on the local environment, including direct impacts on communities, historic and cultural resources and quality of life issues. Those decisions are often reached without giving due consideration to how seemingly benign policies might produce unintended consequences with far-reaching ramifications. It is PEC's position that localities are best suited to consider the impacts on the community of land use decisions. Significant parts of the proposed Rules would have the effect of diminishing the opportunities for local residents to remain involved in determining critical land use decisions that impact the places they live. For this reason, PEC believes that many of the land use choices that the proposed Rules would set in stone should remain flexible and within the purview of local planning and zoning authorities.

PEC filed comments in WT Docket No. 08-165, the Petition for Declaratory Ruling to Clarify Provisions of Section 332 (c)(7). PEC continues to follow cell tower siting and telecommunications policies matters at the local level throughout its nine county region.

SUMMARY OF COMMENTS

In this Notice of Proposed Rulemaking (the "NPRM") the Federal Communications Commission (the "FCC" or the "Commission") seeks comment on Rules promulgated "to promote the deployment of infrastructure that is necessary to provide the public with advanced wireless broadband services…" PEC is particularly concerned with the interpretation of §6409(a)[1] of the Middle Class Tax Relief and Job Creation Act of 2012 (the "Spectrum Act"). This section created a limited exception to local control over collocation, removal or replacement of equipment on a wireless tower or base station. PEC agrees that it serves the public interest for

[1] Codified at 47 USC §1455(a)

the Commission to seek comments and to craft appropriate Rules that will avoid unnecessary litigation and delay.

However, it is not in the public interest to adopt Rules that usurp the authority of localities to protect the health, safety and general welfare of their constituents—those very beneficiaries of the expanded broadband wireless services that the Rules seek to address. A balance must be stuck. A rule that is appropriate for Deaf Smith County, Texas may well be ill suited for Loudoun County, Virginia. In its desire to establish clarity the Commission must respect the unique knowledge of the facts on the ground that only localities possess. A one size fits all approach should be avoided.

In addition, the proposed Rules implementing §6409(a) of the Spectrum Act is either unclear or misguided. As it stands, a reasonable interpretation of it could result in unlimited additions to towers up to, and even exceeding twenty feet, accompanied by a deterioration of local zoning control over the size and height of buildings. These changes in structures legitimately controlled by local zoning authorities could even change the character of the underlying structure in a way that could undermine or render ineffective previously agreed upon conditions. Thoughtful re-drafting of the Rules could ameliorate some of the problems and provide consistency and predictability for all parties.

REVIEW OF THE WIRELESS BUREAU INTERPRETATION

On January 25, 2013, the Wireless Telecommunications Bureau of the Commission (the "Bureau") offered guidance on §6409(a) of the Spectrum Act (DA 12-2407). By this interpretation the Bureau proposed a rather mechanistic implementation of the provisions of the Spectrum Bill.

Consistent with the *Nationwide Collocation Agreement* it proposed that:

- towers could grow by "10%, or by the height of one additional antenna array…not to exceed twenty feet, whichever is greater…";
- appurtenances could be added to a tower that would extend out by up to twenty feet, or the width of the tower at its widest point, whichever is greater;
- proposed that within the context of §6409(a) a base station includes any "structure that currently supports or houses an antenna, transceiver, or other associated equipment that constitutes part of a base station."
- localities may require the filing of an application for administrative approval, but that 90 days is the maximum period allowed for this process to be completed.

RESPONSE OF THE INTERGOVERNMENTAL ADVISORY BUREAU

In response to the Bureau's interpretation, on July 31, 2013 the Intergovernmental Advisory Committee to the Federal Communications Commission (the "IAC") issued Recommendation Number 2013-9. This interpretation took issue with many of the conclusions reached by the Bureau. In particular it challenged the view that "an arbitrary percentage increase" should be adopted to comply with §6409(a). It pointed out that in some cases those changes in tower size could violate state, local or tribal safety codes and should be subjected to local review and denial, if appropriate.

The IAC also challenged the suggestion that the definition of a base station should be expanded to include any structure that supports or houses a base station. Finally, the IAC recommended that the local authorities, rather than the Bureau, be the "threshold decision-makers with respect to whether the standards for Section 6409's applicability are met..."

PEC COMMENTS ON PROPOSED RULES

Local control over wireless tower approval is preserved by 47 USC §332(c)(7). Section 6409 (a) of the Spectrum Act carves out a limited exception to that rule for "modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such wireless tower or base station." As the NPRM makes clear, the Spectrum Act's purpose is to "ensure that the benefits of a streamlined review process for collocation and other minor facility modifications are not unnecessarily delayed." Misapplication of this provision would eviscerate the well defined and widely understood role that local governments play in the development of infrastructure necessary for the deployment of advanced wireless and broadband services.

PEC is interested in these proceedings because its members have worked hard over more than 40 years with local officials to foster community-sensitive growth. Piedmont region local governments are active participants in Federal and state programs for historic preservation, farmland protection, environmental stewardship, watershed restoration and public recreation. PEC, for example, has worked with the National Park Service to conserve land adjacent to the Shenandoah National Park and the Appalachian National Scenic Trail. PEC has worked with the American Battlefields program to conserve and enhance identified Civil War battlefields.

Local proceedings offer citizens an opportunity to comment upon and to exert influence on important decisions. The Rules, as proposed, would preclude such involvement, both by removing any discretion and also by arrogating to the Commission local land use choices traditionally exercised by local authorities.

It is important that the Commission not permit these proceedings to spawn a series of unintended consequences that lead to wireless carriers pushing for unconstrained growth and localities responding by restricting initial grants of permits to construct facilities. The Spectrum Act mandates that "a State or local government may not deny, and shall approve, any eligible facilities request for a modification." It is important to note that this exception only applies to modifications, not considerations of new facilities. If reasonable controls over modifications of towers to permit collocation of new transmission equipment, removal of transmission equipment and replacement of transmission equipment are defined so broadly and are no longer within the purview of local authorities, those authorities will have no alternative than to more strictly scrutinize and limit the initial grants of authority.

Questions Posed By the NPRM

What is a substantial change in physical dimension?

The proposed replacement or collocation should be consistent with original approved design as well as any conditions that were attached to that approval. Whether measured by height, width, circumference or volume, the physical dimension of a tower or base station is expressed in more than simple numbers. Particularly in light of rapidly changing technology and engineering advances, physical dimensions can encompass a wide variety of changes. In order to preserve the integrity of the national and local partnership the Commission should insist that fidelity to the originally approved design must be respected for all applications under these Rules thereby honoring local process while allowing for the improvement of facilities.

An increase "by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet..." is a substantial change to many existing cell

towers. Twenty feet added to an 80 foot cell tower is a 25% increase. As the proposed Rules allows the tower to grow by 10% or the height of one additional antenna array, "whichever is greater…" and creates a further loophole by permitting an even greater increase "if necessary to avoid interference", it is entirely predictable that 10% will be the minimum, 20 feet the mid-range and more than 20 feet the upper range of proposed tower increases. *The twenty foot standard should not be applied to all towers.* It could be an appropriate in some circumstances, but it should not be allowed "by right" in all circumstances.

A single increase of 10% would not appear to be a substantial change. However, if there is a second, third or additional 10% increase, the change, while complying with the letter of the proposed regulation, would be substantial. A one hundred foot tower grows to nearly 150 feet after four collocation requests. Unless limited by rule, that number can go up indefinitely.

Whether considering increases of 10% or additions of 20 feet, the proposed Rules do not specify whether the changes are to be measured from the originally approved structure or from structure as modified by previous applications of the Spectrum Act. Care must be taken not to create rule that would extend reach of §6409(a) to enable substantial modifications to occur through an incremental process. As proposed, the Rule will prevent localities from exercising individualized reviews of the unusual applications. "May not deny and shall approve" could have implications that are inconceivable to the Congress, the Commission, the localities or the participants in this Docket.

A simple solution is to permit one increase of 10% to the initially approved height. This rule would allow collocation and replacements while at the same time preserving the integrity of the localities' permitting authority. Subsequent additions should be subject to local authority for

specific determinations of the impact upon the health, safety and general welfare of those modifications.

Appurtenances of 20 feet or the width of the structure at its widest point is far too permissive. This by right increase in the size is a perfect example of a "one size fits all" solution that. It suffers from the same problems as the 10% solution. Factors that the Rules should address, but do not include: Can appurtenances be added to appurtenances? What type of appurtenance is eligible for this treatment? What size must the original structure be for this 20 foot expansion to be defined by Regulation as an insubstantial change? If the original structure is only 40 feet high is a 20 foot appurtenance not a substantial change in its physical dimension?

The appurtenance rule appears to be one that could be just right in some circumstances, but could present serious safety concerns in others. As proposed, the Rule may create health, safety and welfare concerns or direct violations of local ordinances important to federal policies for historic preservation, water quality, farmland preservation, or other similar federal priorities.

To remove from the localities the opportunity to deny an obviously unsafe modification to an existing wireless tower or base station is an invitation to disaster. A collapsed tower will be completely incapable of providing any wireless services, let alone the advanced wireless services that the Spectrum Bill seeks to facilitate.

<u>What is a wireless tower or base station?</u>

Base stations should not be defined to include buildings, water towers, utility poles, church steeples, or any of the many other structures upon which wireless antennas are currently mounted. *For purposes of this rule, there should be a clear distinction between the tower, or*

other support structure that is built for the purpose of supporting a wireless antenna and buildings or other structures that are incidentally used for that purpose.

The proposed rules define a wireless tower as a structure built for the "sole or primary purpose of supporting any FCC-licensed…antennas and their associated facilities…"[2] A Base station, however, is defined much more expansively to be "a station at a specified site that enables wireless communication between user equipment and a communications network…It includes a structure that currently supports or houses an antenna…"[3] The proposal to interpret "wireless tower or base station" beyond those structures that were built for the sole or primary purpose of providing support for broadcast equipment invites a host of problems.

Given this broad definition and the FCC fiat that localities must approve any modification within 90 days, localities could be faced with an onslaught of administrative filings announcing increases in sizes to structures generally recognized as towers, as well as structures that appear, to the ordinary person, as office buildings, water towers, silos and commercial structures.

If this rule permits a building owner to increase the height of the structure by 10% or twenty feet, whichever is greater and add appurtenances as wide as the widest part of the existing structure and further mandates that a locality "may not deny, and shall approve" that change it would truly be a radical expansion of federal authority. The language of §6409(a) reveals no such Congressional intention of a radical departure from well established principles of Federalism. Instead, it manifests a desire to allow reasonable modifications to existing infrastructure to permit wireless services to be deployed in a measured and efficient manner.

[2] Proposed addition to Subpart CC §1.40001(b)
[3] Proposed addition to Subpart CC §1.40001(b)

Should the Commission substantially adopt the Rules as proposed it should, at the very least, distinguish between towers built for the sole or primary purpose of supporting antennas and those structures that are built for any other purpose but that incidentally support an antenna. As has been pointed out above, the possibility of removing from the control of a locality such fundamental zoning powers as adding height to a building or changing its dimensions should be carefully constrained.

What is an existing wireless tower or base station?

"Existing wireless towers and base stations" should not be hypothetical transmission support structures. It must be a structure that has been approved by local authorities for purposes of supporting wireless transmission equipment. The definition should be straightforward. If the structure bears no transmission equipment, it is not an existing tower or base station. The possibility suggested in the NPRM that §6409(a) covers *any* structure in existence is indeed far reaching. Under this interpretation localities must approve collations on structures where locations do not yet exist. Once again, if adopted, this change in the Rules, let alone the responsibilities of the diverse levels of government involved is unprecedented and is not supported by the language of the Spectrum Act.

What are collocation, removal, and replacement?

Collocation should be a simple concept to define and understand. It should mean that new wireless equipment is being added to a structure that has already been approved by a locality to support wireless transmission equipment. New equipment must be of the same or a similar characteristic as the existing and approved equipment.

Removal should simply be the taking down of the existing tower or equipment. This easily understood concept well illustrates the potential for mischief if the term base station is expanded to cover any building. Should a building housing wireless equipment fall within the purview of the expansionist definition of base station, a locality "may not deny and shall approve" the removal of that building upon the simple filing of an administrative application. Localities would be powerless to deny this removal and arguably equally powerless to deny construction of a replacement to the building that had previously supported wireless transmission equipment. While this possibility may seem far-fetched, unintended consequences are often born of unlikely situations. A Rule issued by the FCC may not be modified or interpreted by a locality to fit an unexpected situation.

Replacement is bit more difficult to define. It could be as simple as the replacement of broken or defective equipment, or it could be a change in technology or type of structure. However, the replacement should be consistent with the original approval, for example an approved monopole should be replaced with a comparable monopole, and a stealth design must be replaced with another stealth design.

If Replacement is an open-ended concept that would lead to unrecognized outcomes, localities will be loathe to accept as binding any plans proposed for initial installations. Collocation, removal and replacement must be carefully limited to prevent the limited exception provided for in §6409(a) from swallowing the Rules created in §332(c)(7)(B).

<u>Must a government approve a modification that does not conform to an existing permit condition?</u>

A locality should not be required to permit a modification to a wireless tower or base station that does not conform to the existing approval. *Simply stated: any proposed modification to an eligible facility that does not conform to its existing permit must be considered as a substantial change.* Terms and conditions that have been worked out in the initial approval should not be so easily abrogated.

What does "shall not deny and shall approve" mean?

A review of even a run-of-the-mill Eligible Facility Request is necessary. A locality should have the power to review the Request and if it does not comply with basic safety measures, the locality should be able to reject the application without violating the Spectrum Act. If the Rules are adopted in a vacuum, the outcomes could hinder, rather than help the goal of increased access to advanced wireless technology.

Whatever process is adopted it should be clear and well understood. Any application must provide ample documentation to the locality for the locality to perform its duty of protecting the health, safety and welfare of its citizens.

The Rules should make it clear that an application must still comply with all relevant laws and regulations. Local authorities frequently require set-backs from neighboring properties as part of a zoning ordinance. In individualized approvals of special exceptions a locality might have required that a "fall zone" the height of the approved tower be established between the transmission structure and nearby buildings or properties. If the tower or structure is allowed to increase without any conditions, these safe guards would disappear. *The Commission should ensure that these public safety conditions are preserved in any tower modification under the Rules.*

At the very least an application should provide all the information necessary for the locality to determine if the proposal is an Eligible Facilities Request. Until matters raised above are resolved, it is difficult to characterize what details should be required, but if Commission adopts a measured approach to implementing the Spectrum Act, the Application should be based upon the existing facility's prior approval, and contain enough information to demonstrate that the modification is for a collocation, removal or replacement of transmission equipment that does not substantially change the physical dimensions of the existing, approved, tower or base station.

The Application should also demonstrate that the proposal is in compliance with applicable safety standard rules, including electrical and structural codes. If the Commission proposes to take over zoning functions, it must at least address those health, safety and general welfare issues currently addressed at the local level.

In the absence of a clear and articulate set of rules, an applicant should not be able to avail itself of a "deemed granted" approval. Such a result should be seen as an extraordinary remedy that should be based upon clear Congressional intent. A Court should be forum for determining whether there has been a violation of Spectrum Act. Only after a hearing at which all parties have an opportunity to present their case, should a remedy be fashioned. The applicant should bear the burden of proof in any such proceeding.

To permit "deemed granted" authority without a robust application process is to cede local zoning authority even further from localities, possibly to the wireless carriers or their contractors.

Localities should be granted leeway in crafting the form of any application as well as having the right to impose reasonable fees for their review. The health, safety and welfare of the

citizens of each locality are the primary concern of most zoning ordinances and statutes. Those laws and the rules to implement are enacted in good faith, and the Commission should be slow to substitute itself for locally elected leaders.

Should FCC expedite or tailor environmental review for DAS and small cells?

The Commission should resist efforts to short-circuit environmental and historic review of DAS and small cell facilities. Adopting a categorical exclusion from either the National Environmental Policy Act of 1969 (NEPA) or from Section 106 review under the National Historic Preservation Act of 1966 (NHPA) would be a mistake. While there may be circumstances where the environmental or historic impact is non-existent or *de minimis*, a categorical exclusion will miss those instances where the impact is significant and severe.

Should FCC change definition of collocation?

The definition for purposes of determining deadlines under the "shot clock" should be the same as the definitions adopted pursuant to §6409(a).

Should FCC clarify when an application is complete?

To the greatest extent possible, the FCC should permit localities to establish when an application is complete.

CONCLUSION

Congress did not repeal 47 USC §332(c)(7). By enacting the Spectrum Act Congress established a limited exception to local siting authority for tower modifications that do not substantially change the physical dimensions of the existing tower. The Rules proposed in this NPRM exceed that limited scope of change in the law. The proposed Rules have the potential to

transform the Commission into a permissive national zoning Board, and kick off a new round of conflict between cellular developers and localities, with the public stuck in the middle, and the Congressional goal of responsible expansion of broadband services being the ultimate loser.

Respectfully submitted this 3rd day of February 2014

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